

Cite as 2009 Ark. App. 658

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CACR09-168

BRENT DANIEL ROUZER
APPELLANT

V.

STATE OF ARKANSAS
APPELLEE**Opinion Delivered** October 7, 2009APPEAL FROM THE CRAWFORD
COUNTY CIRCUIT COURT
[CR 2008-69 II]HONORABLE MICHAEL MEDLOCK,
JUDGE

AFFIRMED

DAVID M. GLOVER, Judge

Brent Rouzer was convicted by a Crawford County jury of raping his seven-year-old daughter and sentenced to twenty-five years in the Arkansas Department of Correction. On appeal, Rouzer argues that the trial court erred (1) in denying his motion to have his daughter declared incompetent to testify and to have her testimony stricken; and (2) in denying his motion for directed verdict. We affirm.

Although Rouzer's sufficiency argument is his second argument on appeal, we address it first due to double-jeopardy concerns. *Standridge v. State*, 357 Ark. 105, 161 S.W.3d 815 (2004). In *Laughlin v. State*, 316 Ark. 489, 494, 872 S.W.2d 848, 851 (1994), citing *Moore v. State*, 315 Ark. 131, 134, 864 S.W.2d 863, 865 (1993), our supreme court set forth the standard of review for challenges to the sufficiency of the evidence:

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The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. *Thomas v. State*, 312 Ark. 158, 847 S.W.2d 695 (1993). Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Lukach v. State*, 310 Ark. 119, 835 S.W.2d 852 (1992). In determining the sufficiency of the evidence, we review the proof in the light most favorable to the appellee, considering only that evidence which tends to support the verdict. *Brown v. State*, 309 Ark. 503, 832 S.W.2d 477 (1992).

A person commits rape if he engages in sexual intercourse or deviate sexual activity with another person who is less than fourteen years of age. Ark. Code Ann. § 5-14-103(a)(3)(A) (Supp. 2009). “Deviate sexual activity” is defined, in pertinent part, as “any act of sexual gratification involving the penetration, however slight, of the ... mouth of a person by the penis of another person; or the penetration, however slight, of the labia majora ... of a person by any body member ... manipulated by another person.” Ark. Code Ann. § 5-14-101(1)(B) (Supp. 2009).

Rouzer’s sufficiency argument is not preserved for appeal. Rule 33.1(a) of the Arkansas Rules of Criminal Procedure requires that in a jury trial, motions for directed verdict must be made at the close of the prosecution’s evidence and at the close of all of the evidence. Here, Rouzer made a directed-verdict motion at the close of the State’s case in chief; he renewed it at the close of the evidence offered by him; the State called a rebuttal witness after Rouzer rested; but Rouzer did not renew his directed-verdict motion at the close of all the evidence. Because Rouzer failed to renew his directed-verdict motion after the presentation of the State’s rebuttal testimony, his sufficiency argument is not preserved. *DeShazo v. State*, 95 Ark. App. 398, 237 S.W.3d 493 (2006). We further note that if the merits were reached,

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the uncorroborated testimony of a rape victim alone is sufficient to sustain a conviction. *Standridge, supra*. Rouzer's daughter testified that he put cherry oil on her "privates" and licked it off and that he put his "private" into her mouth. This testimony alone would be sufficient to sustain Rouzer's rape conviction.

Rouzer's initial argument on appeal is that the trial court erred in finding that his daughter was competent to testify. Specifically, he argues that although his daughter appeared to be competent during the competency hearing, "it became clear as she testified that she was unable to either receive or retain accurate impressions, or to accurately transmit them to the factfinder."

The competency of a child, in a case involving a sexual offense, is a matter primarily for the trial court to decide, as the trial judge is best able to assess the child's intelligence and understanding of the necessity for telling the truth. *Laughlin, supra*. The question of a witness's competency is a matter lying within the sound discretion of the trial court, and in the absence of clear abuse of that discretion, the appellate courts will not reverse such a decision on appeal. *Byndom v. State*, 344 Ark. 391, 39 S.W.3d 781 (2001). The trial court must begin with the presumption that every witness is competent to be a witness; the party alleging that a witness is incompetent has the burden of persuasion. *Id.* The criteria for determining whether a witness is competent is (1) the ability to understand the obligation of an oath; (2) an understanding of consequences of false swearing; (3) the ability to transmit a reasonable statement of what has been seen; and (4) the capacity to transmit a reasonable statement of what has been seen, felt, or heard. *Chappell v. State*, 18 Ark. App. 26, 710

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S.W.2d 214 (1986). Competency is not to be confused with reliability. *Byndom, supra*. Mere inconsistencies or hesitation in testimony may affect credibility but not the competency of a witness. *Chappell, supra*.

Rouzer points to inconsistencies in his daughter's testimony in support of his argument for incompetency. He cites *Payne v. State*, 177 Ark. 413, 6 S.W.2d 832 (1928), for the proposition that a trial court has a duty to closely follow the testimony of a witness about whose competency there is a serious question due to youth, and that if it appears that the witness, during the course of examination, does not appreciate the questions asked and the relevancy of the answers because of his youth, the trial court has a duty to exclude the testimony, even if the witness indicated in preliminary examination that he understood the obligation of an oath. However, the court in *Brewer* also noted that the question of competency rests primarily with the trial judge.

When Rouzer objected to his daughter's testimony on the basis of incompetency, the trial court conducted a competency hearing. Rouzer's daughter, who was eight at the time of trial, was able to tell the trial court her name, grade, where she went to school, and with whom she lived. The child was able to differentiate between the truth and a lie; she stated that if she told a lie that day, she would get in trouble; and she said that she had never been punished for telling the truth. The trial court then found that she was competent to testify.

While there were inconsistencies in her testimony, Rouzer's daughter testified extensively about the sexual encounter, providing details that a young child would not normally know about, *e.g.*, what a penis looks like and what happens during ejaculation.

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Furthermore, she testified that Rouzer threw the bottle of cherry oil (which he poured on her and licked off of her “privates”) off the deck, and there was other evidence presented that the bottle was found where the child said he threw it. In sum, competency is not to be confused with reliability, and inconsistencies or hesitation in testimony may affect credibility but not the competency of a witness. *Chappell, supra*. While there were inconsistencies in the child’s testimony, that did not affect her competency as a witness. We find no abuse of discretion in the trial court’s ruling that Rouzer’s daughter was competent to testify.

Affirmed.

GLADWIN and HENRY, JJ., agree.